No. 3842

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY W. ELLIOTT,
Plaintiff in Error.

vs.

AMERICAN SURETY COMPANY OF NEW YORK (a corporation),
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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BRIEF FOR PLAINTIFF IN ERROR.

This is action by plaintiff in error for damages for false imprisonment against defendant in error as the surety on the official bond of Richard R. Veale, who was at all times mentioned in the complaint the duly elected, qualified and acting Sheriff of Contra Costa County, California. The complaint alleges that plaintiff in error was arrested by said Veale as such sheriff on the 17th day of September, 1919, on the charge of murder and imprisoned in the county jail of Contra Costa County for a period of twelve days, namely, from the said 17th day of September, 1919, to the 29th day of September, 1919, and further alleges (page 6 Transcript):

"VIII.

"That by reason of such imprisonment and re-
" straint of his liberty as aforesaid, said plaintiff
" was injured in his good name and reputation and
" subjected to shame, disgrace and humiliation be-
" fore the citizens of said County of Contra Costa,
" State of California, and other counties in said
" state, and among his friends and acquaintances,
" and suffered greatly in mind and body by reason
" of the shame, disgrace and humiliation of said
" arrest and imprisonment as aforesaid.

"IX.

"That by reason of the premises plaintiff has
" been damaged in the sum of thirty thousand
" (30,000.00) dollars."

and prays for judgment against the defendant in the said sum of $30,000.

The answer denies the allegations of the complaint and in addition sets up an affirmative defense of probable cause for the arrest and detention of plaintiff and admits that the plaintiff was arrested, held and detained for the period and at the times alleged in the complaint but claims that the said sheriff had reasonable cause therefor.

The cause was tried before a jury in the Southern Division of the United States District Court of the Northern District of California, Second Division, on the 16th day of November, 1921, and the jury returned the following verdict:

"We, the jury, find in favor of the defendant, " provide, however, we award the plaintiff seven " hundred and fifty dollars damages.

"G. F. Neal, Foreman."

Upon this verdict judgment was by the court ordered entered in favor of plaintiff in the sum of $750.00 and for costs; to which verdict and order counsel for both sides duly excepted (Transcript p. 28).

Plaintiff on December 1, 1921, duly filed his petition and motion for a new trial, which said petition and motion were heard by the said court and denied on the 19th day of December, 1921.

Plaintiff thereupon sued out this writ of error from said District Court and presents to this Honorable Court the following as his

ASSIGNMENT OF ERRORS:

First: The court erred in entering judgment in favor of plaintiff in the sum of seven hundred fifty ($750.00) dollars on the verdict rendered herein, because,

(a) The said verdict is inconsistent on its face;

(b) The said verdict is not responsive to the issues formed by the pleadings;

(c) The jury by which said cause was tried found for the defendant and at the same time found for the plaintiff on the same issues and the same evidence. It was thereby determined that plaintiff suffered no damages and at the same time plaintiff

was awarded damages in the sum of seven hundred fifty ($750.00) dollars for the same acts for which the said jury found for the defendant; which said sum of seven hundred fifty ($750.00) dollars is nominal in amount for the imprisonment of this plaintiff in error for a period of at least twelve days upon the charge of murder, as alleged in the complaint herein and admitted in the answer herein;

(d) The said verdict does not support a judgment.

Second: The court erred in refusing to grant plaintiff in error a new trial, because,

(a) The jury by which said cause was tried by its verdict found for the defendant. It was thereby determined that R. R. Veale, the Sheriff of Contra Costa County, the officer for whom defendant in error was and is the surety, did not commit a trespass in the matter of falsely imprisoning plaintiff in error and at the same time plaintiff in error was awarded damages in the sum of seven hundred fifty ($750.00) dollars for the same false imprisonment, which said sum is nominal in amount for the imprisonment of this plaintiff in error for a period of at least twelve days on a charge of murder as alleged in the complaint herein and admitted in the answer herein;

(b) Said verdict was and is inconsistent on its face and plaintiff in error is of right entitled to a new trial.

(c) Said verdict is not responsive to or determinative of the issues formed by the pleadings and plaintiff in error is entitled to have said issues clearly determined.

ONE ISSUE.

One issue only is presented by the pleadings, namely, the tort for false imprisonment, and the jury by its verdict found both ways on the same issue. The verdict is a general one and should "find on all the facts in issue in a general form". The verdict here is contradictory, inconsistent and uncertain and can not be cured by the judgment.

Bashford v. Kendall, 7 Pac. 176.

AN ELEMENTARY QUESTION OF LAW.

The question here presented is elementary and the mere recital of the verdict, together with the assignment of errors hereinabove set out is sufficient to demonstrate that the judgment herein entered should be reversed and a new trial granted to plaintiff in error. The verdict does not decide the issue submitted, is inconsistent on its face, and can not support a judgment.

The word "verdict" has been defined in numberless adjudicated cases. We will quote but one:

> "A verdict may be defined to be the answer of the jury to the questions of fact formed by the pleadings of the parties."
>
> Day v. Webb, 28 Conn. 140, at p. 143.

It is elementary that it should respond to the issues and impart a definite meaning free from ambiguity.

> "A verdict should be certain and impart a definite meaning free from ambiguity. The jury can not find *both, for plaintiff and defendant on the same issue, as for instance, by a verdict giving the plaintiff damages and finding the defendant not guilty.*"
>
> 27 Ruling Case Law, page 858, par. 30, citing Grotton v. Glidden, 84 Me. 589. (Italics ours.)

In further support of these elementary principles we cite from East St. Louis Cotton Oil Co. v. Skinner Bros. Mfg. Co., 249 Fed. 439; 162 C. C. A. 5, decided March 8, 1918, error to the District Court for the Eastern Division of Missouri.

This was an action for labor performed and materials furnished on an open account for reasonable value and the defendant counterclaimed asserting plaintiff's breach of an alleged contract to install a ventilating system at an agreed price while plaintiff asserted that no price had been fixed. On the trial of the case the jury returned the following verdict:

> "We, the jury in the above entitled cause, find the issues herein joined under the petition of plaintiff, in favor of said plaintiff, and we find that defendant is indebted to plaintiff by reason of the account stated in said petition in the sum of forty-five hundred and ninety-four and 79/100 ($4,594.79) dollars.
>
> "We further find the issues herein joined under the counterclaim of defendant in favor

of said defendant, and we assess the damages of defendant under said counterclaim at the sum of one thousand 00/100 dollars."

Carland, Circuit Judge, in delivering the opinion uses the following language:

"The jury therefore in returning a verdict for plaintiff as stated, found that the work performed and materials furnished in the construction of the dust collector was performed and furnished on an open account basis for a reasonable compensation, and thereby also found that there was no special contract as claimed by the defendant. On the other hand in finding for the defendant upon the issues joined under the counterclaim and assessing its damages at the sum of $1000—the jury necessarily found that there was a special contract as claimed by the defendant, and that the defendant had breached the same, to the defendant's damage, in the sum of $1000.

"It requires no argument to make it plainly appear that the verdict of the jury is so inconsistent that no judgment could be entered upon it. Allen v. Sallinger, 105 N. C. 333; 10 S. E. 1020; Gwin v. Gwin, 5 Ida. 271; 48 Pac. 295; Mitchell v. Brown, 88 N. C. 156; Mitchell v. Printup, 27 Ga. 469; Ruth v. McPherson, 150 Mo. App. 694; 131 S. W. 474; Bauer Engineering etc., v. Arctic Ice & Storage Co., 186 Mo. App. 662; 172 S. W 417.

"2. As before stated, the important question litigated by the evidence was whether there was a special contract, and the jury found both ways on the question. It is assigned as error that the verdict is inconsistent with itself and that the trial court erred in entering judgment thereon. The question as to whether the verdict supports the judgment is a question of law which appears on the face of the record without

> a bill of exceptions. Such questions may be assigned as grounds of reversal, although no exception is taken. Dener v. Holmes Savings Bank, 236 U. S. 101 53; Sup. Ct. 265; 59 L. Ed. 435; Nalle v. Oyster, 230 U. S. 165; 33 Sup. Ct. 1043; 57 L. Ed. 1439; Snowden v. Ft. Lyon Canal Co., 238 Fed. 495; 151 C. C. A. 431."

The cases cited by the Circuit Judge in the foregoing case are to the same effect. Ruth v. McPherson, 150 Mo. App. 694; 131 S. W. 474, was an action by a physician for services, and the defendant in his answer alleged the services were negligently performed and were worthless and by way of counterclaim, alleged malpractice on the part of the physician and damages therefor. A verdict for plaintiff for the services and for defendant on the counterclaim was held to be inconsistent with itself and could not stand, inasmuch as the counterclaim was founded upon the same matters pleaded as a defense to the account for services.

Fred Bauer Engineering & Contracting Co. v. Arctic Ice & Storage Co., 186 Mo. App. 662; 172 S. W. 417, was decided by the same court, and was a suit brought on a contract for a stipulated price for performing certain work in accordance with its provisions, and the defendant denied that plaintiff was entitled to recover anything and filed a counterclaim for failure to do the work according to the requirements of the contract and within the time therein provided. A verdict was rendered in favor of plaintiff on its claim, and in favor of de-

fendant on its counterclaim, for an amount greater than the contract price for doing the work. The verdict was held to be so inconsistent that it could not be permitted to stand, since a verdict for plaintiff must necessarily be founded upon at least substantial compliance with the contract by it, while, on the other hand, defendant's right of recovery on the counterclaim depended upon a finding that plaintiff failed to substantially perform its contract. Reynolds, Presiding Judge, in delivering the opinion of the court, uses the following language, (186 Mo. App. 664, 670 et seq.):

> "In this case as in Johnson v. Labarge (cited in the opinion) either party might have appealed upon the ground that it was prejudiced by the verdict; for the plaintiff might well take the position, as it does here, that since the jury found that it had substantially performed the contract, it was entitled to recover, and to have no damages awarded against it on the counterclaim; while on the other hand defendant might, with equal propriety, take the position that since the jury had found that since the plaintiff had breached the contract, defendant was entitled to its damages without the same being cut down by the amount awarded the plaintiff.
>
> "Where, as here, the verdict of the jury is not responsive to the pleadings, is in the very teeth of instructions, and altogether fails to resolve the issue of fact presented to the jury, it appears that either party may justly assert that he is prejudiced thereby in that he had not had a trial and a finding upon the issues in the case.
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> * * * * * * *
>
> "Every litigant is entitled to have the real issues of fact in his case actually resolved by

> those who sit in judgment thereupon, and is not compelled to abide by a verdict which attempts to resolve those issues both in his favor and in that of his adversary."

In the instant case the plaintiff has alleged that he was imprisoned and held in confinement in the county jail of Contra Costa County, California, for a period of twelve days, on a charge of murder. He has brought his action to have it determined by a jury of his peers that he was wrongfully held and has asked for damages. The damages which he has suffered arise from being falsely charged with such a crime and unlawfully imprisoned for twelve days. He should not be compelled to abide by a verdict which allows him the nominal sum of $750 as damages for such a continued wrong and at the same time finds the person responsible for the wrong guiltless.

That such a verdict is inconsistent on its face and can not be permitted to stand, we submit, is self-evident. If any further citation be necessary, we call attention to the recent case of Joseph Rosenthal v. United States of America, decided by this Honorable Court on December 5, 1921, and subsequent to the trial of the case at bar. This was a criminal case in which the plaintiff in error was indicted under two counts, the first of having willfully and feloniously bought and received certain stolen cigarettes, and the second charging him at the same time and place of having the same cigarettes in his possession. The jury brought in a ver-

dict of not guilty on the first count, but found the plaintiff in error guilty on the second count.

Ross, C. J., in the concluding paragraph of the opinion of the court, uses the following language:

> "The difficulty is that there was but *one* transaction involved in the two counts of the indictment which was based under the statute mentioned, and according to the evidence, but one transaction between the plaintiff in error and the thieves. By its verdict upon the first count of the indictment the jury found that plaintiff in error neither bought nor received the cigarettes from them with knowledge of the theft, and by its verdict upon the second count, that the plaintiff in error was at the same time and place in possession of the property with such guilty knowledge. The two findings are thus wholly *inconsistent* and *conflicting.* For this reason we feel obliged to reverse the judgment and remand the case for a new trial." (Italics ours.)

In the instant case, we submit that the verdict is wholly inconsistent and uncertain. In such cases it is uniformly held that the trial court *must* grant a new trial and that there is no discretion on the part of the trial judge. Pugh v. Bluff City Excursion Co., 177 Fed. 399, was error to the Circuit Court of Appeals for the Sixth Circuit. Plaintiff was a widow who sued for damages for the death of her son. The jury found for the plaintiff and fixed her damages at one dollar. The court held that the evidence showed that if plaintiff was entitled to recover at all it was in a substantial amount and that the conclusion was unavoidable

that the verdict was simply a compromise to prevent a disagreement, and held that in a case where the verdict is *inconsistent* on its face it becomes a positive duty on the part of the trial judge to set aside the erroneous proceeding and grant a new trial.

In Glenwood Irrigation Co. v. Vallery, 248 Fed. 485 (8th Circuit), decided January 26, 1918, under a similar state of facts, where the jury found for a much less amount of damages than the undisputed evidence showed, the court held that it was the *duty* of the trial court as *a matter of law* to decline to enter judgment upon so inconsistent a verdict and that it was an abuse of discretion to deny a new trial.

So also in United Press Association v. National Newspaper Assn., 254 Fed. 285 (8th Circuit), decided November 21, 1918, which was an action brought upon a breach of contract. The jury found that defendant broke the contract but awarded the plaintiff a much less sum than the undisputed evidence showed it was entitled to recover. *Held,* that the verdict was *inconsistent* and that the refusal of the trial court to grant plaintiff a new trial was an abuse of discretion.

The verdict herein is as inconsistent and uncertain as a general verdict could be. There is but one issue in the case and the jury found both ways upon the same facts submitted for its consideration upon this issue. Plaintiff in error is entitled as a mat-

ter of right to have the said issue and any and all material issues, clearly determined.

The statement of the verdict and the assignment of errors herein sets forth the elementary grounds upon which the reversal of the judgment and the granting of a new trial are sought. We respectfully submit that the decisions herein cited amply support the contention of plaintiff in error that he is entitled to a new trial and that the same should be granted as a matter of right.

Dated, San Francisco,
April 26, 1922.

Respectfully submitted,

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